

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

RECEIVED

OCT 21 2004

MAYOR & COUNCIL

IN RE:

CUMBRE DEVELOPMENT CORP.,

Debtor.

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Case No. 02-32345-LEK
Chapter 7

**TRUSTEE'S MOTION TO SELL PROPERTY FREE AND CLEAR OF LIENS
PURSUANT TO 11 U.S.C §363 TO FIRST NATIONAL BANK**

TO THE HONORABLE LARRY E. KELLY, CHIEF UNITED STATES BANKRUPTCY
JUDGE:

COMES NOW DONALD S. LESLIE, Trustee herein, moves this Court for authorization
to sell real property free and clear of liens pursuant to Section 363 of the Bankruptcy Code and
Rule 6004 of the Federal Rules of Bankruptcy Procedure, and respectfully represents:

1. The Court has jurisdiction over this proceeding pursuant to 11 U.S.C. § 363, 28
U.S.C. §§ 1334 and 157, and Rules 6004, 2002, and 9014, Federal Rules of Bankruptcy
Procedure.

2. This case was originally filed as a Chapter 11 proceeding and was converted to
Chapter 7 on November 19, 2003. Donald S. Leslie was appointed Trustee on or about the same
date and is currently acting in such capacity.

3. The Trustee wishes to sell the Cumbre Subdivision (the sole asset of this estate),
more particularly described as:

(a) The parcels of Real Property described below:

Parcel 1: Lots 1 through 4, Block 1; Lots 1, 2, 4 through 9, 12, 13, 29, 30, 32, 34,
36 through 43, 45 through 53, and Lot 56, Block 2; and Lots 1 through 4, Block 3,
CUMBRE ESTATES UNIT 1 "AMENDING SUBDIVISION", an addition to the
City of El Paso, El Paso County, Texas according to the Plat thereof on file in
Volume 76, Pages 33a and 33b, Plat Records of El Paso County, Texas;

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10-21-04 BY *VR*

Parcel 2: The parcels described by metes and bounds on Exhibit A, attached hereto and incorporated herein by reference, commonly referred to as Phase 2, 3, 4 and 5 of Cumbre Estates Subdivision; and,

Parcel 3: One hundred percent (100%) fee ownership of all General Common Elements (the "Common Areas") as defined in the Declaration of Covenants, Conditions, Restrictions, and Easements of Cumbre Estates Homeowners Association Inc. dated April 26, 2000, of record in Volume 3787, Page 254, Real Property Records of El Paso County, Texas (the "Declaration").

(b) All of the rights and interest of SELLER pursuant to the Declaration and rights to Common Areas defined in the Declaration.

(c) All rights and interest of SELLER in and to the Cumbre Estates Homeowner's Association, Inc.

(d) All existing buildings on the Real Property and/or Common Areas described in the Declaration and other improvements to the Real Property and Common Areas including all water, sewer and drainage facilities, wells, treatment plants, pump stations and equipment, supply, collection and distribution systems, paving, landscaping and other improvements (collectively the "Improvements").

(e) All fixtures, equipment and supplies (the "Fixtures and Equipment") now or hereafter attached to, used, intended or acquired for use for, or in connection with, the construction, maintenance, operation or repair of the Real Property, Common Areas or Improvements, or for the present or future replacement or replenishment of used portions of it, and all related parts, filters and supplies, and other equipment and fixtures, and all additions and accessions to them, and all sellers' and/or manufacturers' warranties with to respect same.

(f) All wastewater, fresh water and other utilities capacity and facilities (the "Utilities Capacity") available or allocable to the Real Property, Common Areas and Improvements or dedicated to or reserved for them pursuant to any system, program, contract or other arrangement with any public or private utility, and all related or incidental licenses, rights and interests, whether considered to be real, personal or mixed property, including the right and authority to transfer or relinquish any or all such rights and the right to any credit, refund, reimbursement or rebate for utilities facilities construction or installation or for any reservation fee, standby fee or capital recovery charge promised, provided or paid for by SELLER or any of SELLER's predecessors or Affiliates (defined below), to the full extent now allocated or allocable to the Real Property or Improvements, plus all additional Utilities Capacity, if any, not dedicated or reserved to the Real Property, Common Areas or Improvements but which is now or hereafter owned or controlled by SELLER or by anyone (an "Affiliate", whether a natural person or an entity) who directly or through one or more intermediaries controls, is controlled by or is under common control with SELLER, to the full extent that such additional Utilities Capacity is necessary to allow development, marketing and use of the Real Property, Common Areas or Improvements for their highest and best use.

(g) All contracts, franchises, licenses and permits whether executed, granted or issued by a private person or entity or a governmental or quasi-governmental agency, which are directly or indirectly related to or connected with the use, construction, operation, development or sale of the Real Property, Common Areas or Improvements, whether now or at any time hereafter existing, and all amendments and supplements thereto and renewals and extensions thereof at any time made, and all rebates, refunds, escrow accounts and funds, or deposits and all other sums due or to become due under and pursuant thereto and all powers, privileges, options and SELLER's other benefits thereunder.

(h) All estate, right, title and interest acquired by SELLER in or to the Real Property, Common Areas, Improvements, Fixtures and Equipment and Utilities Capacity after execution of this Contract.

(i) Any and all rights and appurtenances (the "Appurtenances") belonging, incident or appertaining to the Real Property, Common Areas, Improvements, Fixtures and Equipment or Utilities Capacity or any part of them.

(j) All SELLER's interest in all existing and future minerals, oil, gas and other hydrocarbon substances in, upon, under or through the Real Property and Common Areas.

(k) Any and all rights and estates in reversion or remainder to the Real Property, Common Areas, Improvements, Fixtures and Equipment, Utilities Capacity or Appurtenances or any part of them.

(l) All rights, powers, privileges, benefits and remedies of SELLER under any of the contracts and under each and every instrument now or hereafter governing, evidencing, securing or guarantying or otherwise relating to or delivered in connection with any of the contracts, all instruments, documents, chattel papers, accounts, general intangibles, earnest money deposits, profits, income, surplus, money, credits, demands and other property (real or personal) and revenues of any kind or character now or hereafter relating to, accruing or arising under or in respect of any of the contracts or paid, payable or otherwise distributed or distributable or transferred or transferable to SELLER under, in connection with or otherwise in respect of any of the contracts.

(m) All other estates, easements, interests, licenses, rights, titles, powers or privileges of every kind and character which SELLER now has, or at any time hereafter acquires, in and to any of the foregoing, including, without limitation, the proceeds from condemnation, or threatened condemnation, and the proceeds of any and all insurance covering any part of the foregoing; and all related parts, accessions and accessories to any of the foregoing and all replacements or substitutions therefore, as well as all other Improvements, Fixtures and Equipment, Leases, Utilities Capacity and Appurtenances now or hereafter placed thereon or accruing thereto.

(n) All rights of SELLER to the subdivision plat, subdivision improvement plans and engineering reports for the Real Property and Common Areas.

(o) Any and all causes of action that SELLER might have against BUYER (SELLER

shall also release BUYER from any such causes of action).

(p) In addition, SELLER shall cooperate with BUYER with obtaining any consents or transfers of rights from the Public Service Board or the City of El Paso.

The above-described property and rights are hereinafter referred to as the "Property." It is the Trustee's intent to sell all of the assets of the Estate.

4. The Trustee seeks permission from this Court to sell the above described real property to FIRST NATIONAL BANK of El Paso, Texas for the sum of Eight Hundred Thousand and No/100 Dollars (\$800,000.00), and a Release of any claims which First National Bank has or may have against the Estate of Cumbre Development Corp., with the exception of First National Bank's proof of claim previously filed in this case. That proof of claim will be subordinated to all other allowed claims in this case. First National Bank reserved the right to object to other claims filed in this Chapter 7. In addition, the Trustee will release any and all claims that Cumbre Development Corp. or the Bankruptcy Estate have or may have against First National Bank.

5. To the best of your Trustee's knowledge, the only lienholders affected by the sale of this property are Winton & Associates, First National Bank, the City of El Paso, and Jobe Concrete Company.

6. While this case was being administered in Chapter 11, and continuing through the date of this Motion, completion of the improvements to Unit 1 of the Subdivision, including the delivery of a water system, has been essential in order for the Cumbre Development Corporation to sell lots in the subdivision. Those improvements could not then, and cannot now, be completed without a significant amount of engineering services being rendered and approval of any plan for a water system by the State of Texas and the Public Service Board of the City of El Paso. It is estimated that the water system will cost \$750,000 to complete.

7. For the reasons cited above, and because of concerns that the requirements of the City of El Paso's ordinances will prohibit profitable development of the subdivision, the real property cannot be reasonably sold to any developer for an amount even approximating First National Bank's lien claim. So long as the real estate remains undevelopable and unsaleable, it cannot generate income for the estate or for its largest creditor.

8. First National Bank would show that has not only the means, but the motivation put the subdivision on the proper track for development so that lots can be sold, so that existing lot owners can build on their property, so that the other lienholders can be paid, and so it can recover on its claim.

9. The sale described herein is the result of and negotiations motivated by the Chapter 7 and in an effort to salvage as much equity as possible for the benefit of the creditors and other parties to this proceeding. The subject property does not generate revenue for the estate. The property is not subject to development at the present time, for the reasons described above.

10. Any outstanding real estate taxes owed on the subject property, as well as other liens (with the exception of the lien of First National Bank) will be paid at closing.

11. This sale is not intended and shall not alter or avoid the current year's tax lien for 2004 taxes.

12. To the extent that the bankruptcy laws require that the Trustee or the U.S. Bankruptcy Court consider an offer to purchase the property that is submitted by a person or entity other than FIRST NATIONAL BANK (a "Competing Offer"), Debtors request that any Competing Offer be required to exceed the present offer by a minimum of \$100,000. The Trustee is not seeking the implementation of a bid procedure, per se. The contract at issue is the

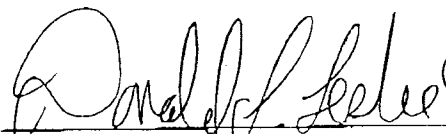
only offer which has been presented to the Trustee for the Property; and, the Trustee believes it should be approved. If the Trustee is not allowed to sell the Property to FNB, the lot owners will not be able to develop their lots, FNB will foreclose its lien, have a large deficiency claim, and the estate will not be able to make a distribution to unsecured creditors.

13. It is the Trustee's position that a sale in this matter is in the best interest of the estate and will net the estate the most money for distribution to creditors by reducing the indebtedness to the lienholders and when the bulk of the real estate is sold, maximizing equity. A copy of this Motion is being forwarded to all creditors in accordance with Local Rule 9014.

WHEREFORE, PREMISES CONSIDERED, DONALD S. LESLIE, Trustee herein, prays that after notice to creditors of the proposed sale, and no objection being filed thereto, this Court enter its order authorizing said sale, free and clear of liens, to FIRST NATIONAL BANK.

Dated this 21ST day of October, 2004.

RESPECTFULLY SUBMITTED,



DONALD S. LESLIE

SBN: 12231000

2731-A Montana Ave.

El Paso, Texas 79903

(915) 565-9000

(915) 565-9191 (fax)

DRAFT

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("Memorandum") is entered into this _____ day of _____, 2004 by and between THE CITY OF EL PASO, TEXAS (the "City"), FIRST NATIONAL BANK (the "Bank"), DONALD S. LESLIE, Trustee of the Chapter 7 Bankruptcy Estate of Cumbre Development Corp. (the "Trustee"), and the individuals who have purchased lots in that subdivision whose signatures are affixed hereto (the "Lot Owners"), collectively all parties hereafter referred to as the "Parties".

Whereas, James Woodahl ("Woodahl") acquired approximately 145 acres of land in the City of El Paso, more particularly described in Exhibit A attached hereto (the "Property")

Whereas, on March 4, 1997, Woodahl obtained approval of a Land Study for development of the Property by the City of El Paso ("~~Land~~-Study Approval Date");

Whereas, on January 21, 1998, the City approved the plat for a 67 (+/-) acre portion of the Property known as Cumbre Estates Unit One;

Whereas, in 1997, Woodahl began a residential development of Cumbre Estates Unit One using a corporation known as Cumbre Development Corp. ("Cumbre") and began to sell lots;

Whereas, Cumbre, failed to engineer or install a water system that would meet the domestic or fire suppression water system standards of either the Public Service Board of El Paso ("PSB") or the Texas Commission on Environmental Quality ("TCEQ");

Whereas, the developer finished construction of the water system and the system was subsequently rejected by the PSB and the TCEQ; and,

Whereas, on September 27, 2002, Cumbre filed for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Western District of Texas, El Paso Division;

Whereas, in November, 2003, after having been in Chapter 11 for over a year, the Chapter 11 bankruptcy proceeding was converted into a Chapter 7 bankruptcy for which Donald S. Leslie was appointed Chapter 7 Trustee;

Whereas, the Bank financed the construction of Phase I of the Cumbre Estates Unit One and took a lien on all of the lots within Cumbre Estates Unit One as collateral for its loan; and,

Whereas, the undersigned Lot Owners purchased lots in the Cumbre Estates Unit One but have been unable to obtain building permits and/or Certificates of Occupancy because of the lack of an adequate water system and incomplete subdivision improvements;

Whereas, it is apparent since the conversion of that Chapter 11 case to one under Chapter 7 that no developer in the City of El Paso is willing to complete the subdivision improvements for Cumbre Estates Unit One because of the problems which the subdivision has and the economic risks that it presents;

Whereas, the Bank has indicated a willingness to purchase the Property and complete the subdivision improvements for Cumbre Estates Unit One in order to recoup its loan and to allow the Lot Owners to use the lots which they purchased;

Whereas, the City has committed its support to the Bank's efforts to complete the subdivision improvements and has agreed to the items set forth in this Memorandum; and,

Whereas, the Lot Owners are willing to forego some of the rights associated with their ownership of lots in order to persuade the Bank to complete the subdivision improvements for Cumbre Estates Unit One;

Whereas, the Parties desire to memorialize their agreement regarding the development of the Property.

NOW THEREFORE, the Parties to this Memorandum of Understanding agree as follows:

1. The Bank has entered into a contract with the Trustee to acquire the Property, a copy of which has been provided to the Parties ("Contract"). The Contract will be subject to Bankruptcy Court approval. If the Contract is approved by the Bankruptcy Court without modification and all conditions precedent set forth in the Contract are met, the Bank will acquire the Property and arrange for completion of the subdivision improvements for Cumbre Estates Unit One as set forth in the letter from the City Engineering Department dated October 16, 2003 including the construction of a water system sufficient to obtain PSB and TCEQ approval ("Subdivision Improvements"). The Bank shall have the right to assign the Contract or any portion thereof to a third party. Further, the Bank shall have the right to assign its obligations to complete the Subdivision Improvements to a qualified contractor.

2. The Trustee agrees to file a motion with the Bankruptcy Court seeking approval of the Contract; not to accept any other offers to purchase the Property or any portion thereof, until such time as the Bankruptcy Court has ruled on the Motion; to fully cooperate in the steps necessary to close the sale of the Property, and to execute a full and complete release of any and all claims that it might have against all of the Parties.

3. The Lot Owners agree to approve the motion filed by the Trustee for the Bank or its assigns to acquire the Property; waive their claims, if any, to the common area the subject of the motion, to any right to a clubhouse, swimming pool or other amenities originally designed with Cumbre Estates Unit One, release the covenants for the Cumbre Estates Unit One and to execute a mutual release to the benefit of the Parties.

4. The City by approval of this Memorandum agrees to the following:

- a. That the Property has vested rights under the ordinances that were in effect on the Preliminary Map Submittal Date. The development of the Property shall be subject only to those regulations and ordinances in effect on the Preliminary Map Submittal Date (the "Applicable Ordinances").
- b. To support the granting by the City Plan Commission of approval of a replat of a portion of Cumbre Estates Unit One of the recreation area presently shown on the Final Plat, which replat shall not affect the vested rights of the Property.
- c. To accept for maintenance upon completion, all subdivision improvements that comply with City Code, including but not limited to the pump station, streets, curb and gutter, and medians for Cumbre Estates Unit One;
- d. To support the granting by the City Plan Commission of a two-year extension for completion of the Subdivision Improvements for Cumbre Estates Unit One.
- e. That the requirements of current Municipal Code Sec. 13.08.170 regarding excess paving cuts for Cumbre Estates Unit One, to the extent applicable, may be satisfied by repaving following completion of all homes on Everest Street.

5. The agreements of the Parties hereunder are expressly subject to and conditioned upon obtaining the agreement of all the Parties hereto and the entry of an Order by the Bankruptcy Court approving all the elements of this Memorandum of Understanding.

THE CITY OF EL PASO, TEXAS

By: _____
Honorable Joseph Wardy, Mayor

DONALD S. LESLIE,
Chapter 7 Trustee

FIRST NATIONAL BANK

By: _____
Douglas McLean, President

Javier Rodriguez

Lorena Rodriguez

Thomas L. Pester

Judith A. Pester

PESTER INVESTMENTS, L.P.

By: _____

Patrick K. Brandon

Maria T. Brandon

William H. Rogers

Brion Gluck

Elisa O. Gluck

J&P VILLAREAL FAMILY L.P.

By: _____

Javier Yarza

Ana C. Yarza

BRIGHAM & ASSOCIATES LLC

By: _____

Mary A. Szostek

Maria Guadalupe Chavez

Norma Martinez

Frank Spencer

Rebecca T. Spencer

Boris Tumarin

Les Watkins